Supreme Court, U.S.
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No. 91-307

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

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CITRUS COUNTY, FLORIDA,

Petitioner,

v.

JOE REDNER, THOMAS GEORGE SECCHIARI, PHYLLIS PATRICK, TAMMY BENARD, and AMANDA OLIVER,

Respondents.

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Petition for Writ of Certiorari to The United States Court of Appeals for the Eleventh Circuit

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Full Faith and Credit Act, 28 U.S.C. § 1738, requires the federal courts (below), where Respondents challenged two adult-entertainment licensing ordinances on the same constitutional grounds to accord to the identical provisions of a successor, permanent licensing ordinance, containing a severability clause, the same preclusive effect, under Florida law, from a final judgment of the Florida courts, which upheld the constitutionality of the earlier, temporary, licensing ordinance, even in light of the clear facial unconstitutionality of the ordinance.

II. Whether under the *Rooker-Feldman* doctrine, the federal courts (below) lack jurisdiction to consider Respondents' challenges to the constitutionality of provisions in a successor, permanent adult-entertainment licensing ordinance, when the ordinance presented to the state courts was a different ordinance and was never considered by the highest state court.

LIST OF PARTIES

PETITIONERS

Appellees in the Eleventh Circuit Court of Appeals

CITRUS COUNTY, FLORIDA, a municipal corporation

CHARLES S. DEAN, individually and as Sheriff of Citrus County, Florida

SKIP HUDSON, acting Citrus County Commissioner sued individually*

ALEX GRIFFIN, acting Citrus County Commissioner sued individually*

WILLIAM F. BROSKA, acting Citrus County Commissioner sued individually*

JOHN BARNES, acting Citrus County Commissioner sued individually*

NICK BRYANT, acting Citrus County Commissioner sued individually

WAYNE WEAVER, current Citrus County Commissioner

CHESTER WHITE, SR., current Citrus County Commissioner

WILBUR LANGLEY, SR., current Citrus County Commissioner

GARY BARTELL, current Citrus County Commissioner

RESPONDENTS

Appellants in the Eleventh Circuit Court of Appeals

JOE REDNER

THOMAS GEORGE SECCHIARI

PHYLLIS PATRICK

TAMMY BENARD

AMANDA BENARD OLIVER

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*Pursuant to Supreme Court Rule 40.3, Commissioners Hudson, Griffin, Broska, and Barnes will be replaced in their official capacity in this case by their successors in office: Wayne Weaver; Chester White, Sr.; Wilbur Langley, Sr.; and Gary Bartell, acting Commissioners. Petitioners did not list these individuals as parties.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED	3
STATEMENT OF THE CASE	5
WHY THE WRIT SHOULD BE DENIED	14
I. THE FULL FAITH AND CREDIT ACT, 28 U.S.C. § 1738, IS MISAPPLIED BY PETITIONER AND DID NOT REQUIRE THE COURT OF APPEALS TO AFFIRM THE LOWER COURT'S INVOCATION OF ABSTENTION.	14
A. The District Court's Abstention From The Merits Of Respondents' Challenges To 88-05 And 88-06 Was Improper.	14

B. The State Court Judgment On Respondents' Constitutional Challenges To 88-05 Does Not Preclude Challenges To The Provisions Of 88-06. 22

II. THE COURT OF APPEALS PROPERLY REJECTED THE PETITIONER'S ARGUMENT THAT THE *ROOKER-FELDMAN* DOCTRINE REQUIRES ABSTENTION OF RESPONDENTS' CONSTITUTIONAL CHALLENGES TO THE PROVISIONS OF 88-06. 28

CONCLUSION 30

TABLE OF AUTHORITIES

Authority	Page
Allen v. Allegheny Co., 196 U.S. 458, 25 S.Ct. 311, 49 L.Ed. 551 (1905)	29
ASARCO, Inc. v. Kadish, 490 U.S. 605, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989)	29
Avalon Cinema Corp. v. Thompson, 677 F.2d 659 (8th Cir. 1981)	17, 18 20
Barnes v. Glen Theater, 59 U.S.L.W. 4745, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991)	17
Ballard v. Wilson, 857 F.2d 1568 (5th Cir. 1988)	24
Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963)	25
Blount v. Rizzi, 400 U.S. 410 (1971)	27
California v. LaRue, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 3342 (1972)	17
Cotton States Mutual Ins. Co. v. Anderson, 749 F.2d 663 (11th Cir. 1984)	23
District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983)	29

Authority	Page
Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116 (1965)	21
Doran v. Salem Inn, Inc., 42 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975)	15
Elrod v. Burns, 427 U.S. 347, 96 S.Ct. 2673 (1976)	25
Freedman v. Maryland, 380 U.S. 51 (1965)	25, 27
Freehling v. MGIC Financial Corp., 437 So.2d 191 (Fla. 4th DCA 1983)	23
FW/PBS v. City of Dallas, 493 U.S. 215 (1990)	12, 19 22, 25 26, 27
Hicks v. Miranda, 42 U.S. at 349, 95 S.Ct. 2281, 45 L.Ed.2d 2223 (1975)	15
Huffman v. Pursue, 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975)	23
I.A. Durbin, Inc. v. Jefferson National Bank, 793 F.2d 1541 (11th Cir. 1986)	23
Johnson v. New York Life Ins. Co., 187 U.S. 491, 23 S.Ct. 194, 47 L.Ed. 273 (1903)	29
Kremer v. Chemical Construction Corp., 456 U.S. at 483, 102 S.Ct. at 1898	22, 24

Authority	Page
Kugler v. Helfant, 421 U.S. 117, 95 S.Ct. 1524, 44 L.Ed.2d 15 (1975)	16
McDonald v. City of West Branch, Mich., 466 U.S. 284, 104 S.Ct. 1799, 80 L.Ed.2d 302 (1984)	22
Migra v. Warren City School District, 465 U.S. 75, 104 S.Ct. 892, 70 L.Ed.2d 56 (1984)	22
Mobile Oil Corp. v. Shevin, 354 So.2d 372 (Fla. 1977)	23
Morgan v. City of Rawlins, 792 F.2d 975 (10th Cir. 1986)	28
National Socialist Party v. Skokie, 432 U.S. 43 (1977)	27
New York Times Co. v. United States, 402 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1941)	25
11126 Baltimore Blvd. v. Prince George's County, Maryland, 110 S.Ct. 2580 (1990)	19
Parsons Steel, Inc. v. First Alabama Bank, 474 U.S. at [illegible], 106 S.Ct. at 772	22
Pennzoil Company v. Texaco, Inc., 481 U.S. 1, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987)	15
Provau v. State Farm Mutual Automobile Ins. Co., 772 F.2d 817 (11th Cir. 1985)	23

Authority	Page
R&S Partnership v. Martin Schaffel Enterprises, Inc., 529 So.2d 794 (Fla. 3d DCA 1988)	23
Redner v. Citrus County, 919 F.2d 646 (11th Cir. 1990)	2, 16 29
Rooker v. Fidelity Trust Company, 263 U.S. 413 44 S.Ct. 149, 68 L.Ed. 362 (1923)	29
Samuels v. Mackell, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971)	15
Schad v. Mt. Ephraim, 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981)	17
Seaboard Coastline R.R. Company v. Cox, 338 So.2d 190 (Fla. 1976)	23
S.E.L. Maduro (Fla.), Inc. v. M/V Antonio de Gastaneta, 83 F.2d 1477 (11th 1987)	23
Sendak v. Nihiser, 431 U.S. 961, 97 S.Ct. 2914, 53 L.Ed.2d 1057 (1977)	22, 23
Shuttlesworth v. City of Birmingham, 394 U.S. 147, 89 S.Ct. 935 (1971)	27
754 Orange Ave. v. City of West Haven, Conn., 761 F.2d 105 (1985)	19, 20
United Books v. Conte, 739 F.2d 30 (1st Cir. 1984)	24

Authority	Page
United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968)	18
Western Life Indem. Co. v. Rupp, 235 U.S. 261, 35 S.Ct. 37, 59 L.Ed. 220 (1914)	29
Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971)	14, 15 16, 17 21, 23
Constitutional Provisions:	
United States Constitution Amendment 1	3
United States Constitution Amendment 14	3
Federal Statutes:	
28 U.S.C. § 1254	2
28 U.S.C. § 1257	29
28 U.S.C. § 1738	3, 14 22, 24
42 U.S.C. § 1983	4, 10 24
42 U.S.C. § 1985(3)	4, 11

Authority	Page
Florida Statutes:	
Chapter 125	9
Citrus County Ordinances:	
Citrus County Ordinance 88-05	7, 8, 9 10, 11 12, 14 16, 20 21, 22 24, 25 26, 27 29
Citrus County Ordinance 88-06	4, 9, 10 14, 21 22, 28 29
Citrus County Ordinance 88-A51	9, 10, 11 12
Other Authorities:	
Full Faith and Credit and Section 1983: A Reappraisal, 63 N.C.L.Rev. 59 (1985)	24

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents, Joe Redner, Thomas George Secchiari, Phyllis Patrick, Tammy Benard and Amanda Benard Oliver urge this Court to deny the Petition for Writ of Certiorari to review the judgments and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in this proceeding on December 18, 1990, and May 20, 1991.

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OPINIONS BELOW

The Opinions of the United States Court of Appeals for the Eleventh Circuit are a December 18, 1990 affirmance in part and reversal in part with remand (of the ruling by the district court), 919 F.2d 646 (11th Cir. 1990), set out as Appendix A of the *Petition*; and a May 20, 1991 order denying a motion for rehearing, set out as Appendix B of the *Petition*.

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JURISDICTION

This Court has jurisdiction to review those decisions of the court of appeals, pursuant to 28 U.S.C. § 1254.

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CONSTITUTIONAL, STATUTORY, AND ORDINANCE PROVISIONS

UNITED STATES CONSTITUTION

Amendment 1

Congress shall make no law ... abridging the freedom of speech ...

Amendment 14, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protections of the laws.

UNITED STATES CODE

28 U.S.C. Section 1738

The Full Faith and Credit Act, 28 U.S.C. § 1738, is set forth as Appendix "C" of the *Petition*.

42 U.S.C. *Section 1983*

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. ...

42 U.S.C. Section 1985(3)

If two or more persons in any State or Territory conspire ... for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws ... whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against one or more of the conspirators.

ORDINANCES ENACTED BY CITRUS COUNTY, FLORIDA

Ordinance 88-05 and Ordinance 88-06 of Citrus

County, Florida are reprinted and included in their entirety in the Appendix to the *Petition* in Appendices "D" and "E".

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STATEMENT OF THE CASE

The Petitioner sets out a Statement of the Case which fails to include a substantial amount of historical factual material which is critical for this Court to adequately consider the questions presented for review. This material is respectfully submitted herein.

It is important to note that the same decision of the Court of Appeals, which is at issue herein, is also the basis for another Petition for Writ of Certiorari filed with this Court (Case No. 91-316). The questions presented for review bear some similarity, but are not identical, and the Petitions focus on different aspects of the Court of Appeals' decision. A proper recitation of all pertinent facts is still critical for any consideration.

In early March of 1988, Respondent Redner became interested in opening and operating an adult entertainment establishment in Homosassa Springs, an unincorporated community located in Citrus County, Florida. In this endeavor, Redner investigated all applicable Citrus County ordinances, rules, regulations and permitting requirements. On the basis of this investigation, which included direct inquiries to Citrus County employees regarding any such restrictions which applied to the contemplated business,

Redner determined properly that there were no regulatory obstacles in effect which would prevent him from opening an adult entertainment establishment at a specific premises. Redner was clear and candid in his description of the proposed business.

On or about March 17, 1988, on the basis of this reliance, Redner entered into a lease for the subject premises for eighteen (18) months, thereby incurring an obligation of $36,000.00 for the term of the lease. At this point in time, Redner also undertook repairs and alterations to the premises to facilitate the presentation of performance dance exhibitions at a cost of approximately $10,000.00. The leased premises was located in a commercially zoned area and was formerly a bar which served alcoholic beverages.

In an effort to comply with all existing local requirements to open the business, the proper agencies were contacted in order to secure all appropriate inspections and permits. On March 23, 1988, the premises was inspected by the Citrus County Public Health Unit for food service inspections and permits. A fire inspection was also conducted.

The proper permits were issued on March 24, 1988. Also on that date, occupational licenses for "Dance Hall", "Entertainment Cafe", and one for "Merchandise Vending Machines" were issued by the Citrus County Tax Collector in preparation for the imminent opening of the establishment. Redner was forthright in his description of the business to County officials in his attempt to get all

proper licenses and permits. No specific occupational license designation existed at that time relating to adult entertainment facilities. No attempt was made to hide the intended use of the leased premises from any Citrus County employee consulted, or from the public in general. Presumably, because of Redner's candor and the nature of the business, the anticipated opening of the establishment was an event which was surrounded by extensive media attention. No other adult entertainment facility existed in Citrus County prior to Redner's endeavor.

The Petitioner uses March 25, 1988 as the starting point in the Statement of the Case contained in the Petition. It was on this date that Redner announced he would open his establishment. On the same date, the Citrus County Board of County Commissioners met in emergency session and enacted Citrus County Ordinance 88-05, an emergency ordinance establishing licensing requirements for adult entertainment establishments and their employees. The nature of any alleged "emergency" is unknown other than the anticipated opening of Redner's use. A copy of the ordinance is attached as Appendix "D" to the *Petition*.

Emergency Ordinance 88-05 imposed the requirement that a license be obtained prior to the presentation of any constitutionally protected expression by any business deemed to be an adult use. The pertinent licensing application required the submission of extensive information and lengthy investigation by several administrative and law enforcement agencies. While there was a time limit for the granting or denial of a license, the provisions dealing with

the appeal of any such denial contained no time limit. The fee for any such license was $750.00.

The ordinance also imposed similar requirements that any employee working at any adult use establishment similarly obtain an adult use permit to legally be employed at any such establishment. The application requirements were again extensive and the time limits for the granting or denial of any application for such a permit, while limited, had no such limitation on any appeal process of the denial of any permit. A fee of $50.00 was required with any application for permit.

Besides the provisions regarding licensing and permitting contained in the ordinance, Section 2-8 stated that, "Each licensee shall keep such records and make such reports as may be required by the County Administrator and the departments to implement this ordinance and carry out its purpose." No limitation or definition was included in the ordinance to clarify this provision.

Section 5 of the ordinance established criminal penalties for any failure to comply with any provision of Citrus County Ordinance 88-05. These penalties were subsequently enforced on the Respondents.

In respect to any denial or revocation of a license, no provision for judicial review appeared anywhere in emergency Ordinance 88-05. The only appeal of any state action occasioned by the ordinance, which resulted in denial, was to the Board of County Commissioners, the same body with the ultimate responsibility for the administration of the ordinance (Section 6-1).

On March 29, 1988, Redner opened his establishment, and was arrested and charged with operating an adult entertainment establishment without a license. Two subsequent attempts to open the establishment also resulted in arrests.

On March 31, 1988, when Redner was arrested the third time, bond was placed at $250,000.00. Only when Redner agreed he would not again offer adult entertainment, unless either a court order or a license issued pursuant to Citrus County were obtained, was his bond reduced and his release effected.

On May 24, 1988, the Citrus County Board of Commissioners met in a regular session and approved Ordinance 88-06, an adult entertainment licensing ordinance substantially similar to 88-05, but with provisions providing additional bases for license denial and other substantive provisions. Ordinance 88-06 superseded Ordinance 88-05.

Also adopted on May 24, 1988, was Ordinance 88-A51, an ordinance amending the Citrus County zoning ordinance by establishing adult entertainment use regulations.

Because of Florida statutory law, a Florida political subdivision is precluded from enacting any preclusive zoning ordinance validly without complying with the proper notice and hearing requirements.[1] This procedure takes a

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[1] Chapter 125, Florida Statutes, specifies the statutory requirements for the enactment of zoning ordinances. Section 125.66(5)(b)(1) states that, "The board of county commissioners shall hold two (2) advertised public hearings on the proposed ordinance or resolution. Both hearings shall be held after 5:00 P.M. on a weekday, and the first shall be held approximately seven (7) days after the day that the first advertisement is published. The second hearing shall be held approximately two (2) weeks after the first

substantial amount of time and cannot be done on an emergency basis.

It was subsequent to the passage of emergency Ordinance 88-05, that the procedure to adopt a zoning ordinance was initiated and resulted in the passage of Citrus County Ordinance 88-A51, a zoning ordinance which by its provisions made the establishment of an adult use, a non-conforming and illegal use because of the locational restrictions contained in the ordinance.

On the basis of the violations of emergency Ordinance 88-05, state criminal prosecutions ensued against Respondents herein. Charges were leveled against Redner as owner, Thomas Secchiari as manager, and Ms. Patrick, Ms. Benard, and Ms. Oliver as performance dancers. The first arrests occurred prior to any employee disrobing to the extent that any of the specified anatomical areas prohibited by the ordinance were displayed.

Redner, et al., after the state criminal prosecutions had been initiated, brought action in Federal court against the County, the County Commissioners individually, and the Sheriff, individually, to challenge the constitutionality of Ordinance 88-05 and predicated in part on 42 U.S.C. § 1983. This Federal action was filed March 31, 1988. A subsequent amendment to the action resulted in combined challenges to licensing Ordinances 88-05 and 88-06.

On motions to dismiss and motions to abstain from

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hearing and shall be advertised approximately five (5) days prior to the pubic hearing. The day, time, and place at which the second public hearing will be held shall be announced at the first public hearing." F.S. 125.66(5)(b)(1).

further proceedings, the District Court, Melton J., held that: (1) pending criminal proceedings in state court against promoters did not warrant abstention; (2) failure to allege compliance with notice requirements warranted dismissal without prejudice of pendent cause of action based on Florida law; (3) proposed class of practitioners of nude dance or adult entertainment was not type of class that would support civil rights conspiracy action; and (4) class composed of person whose activities conflict with Christian beliefs is not protected under § 1985(3).

Subsequent to the filing of the first federal action, a second action challenging Ordinance 88-A51 as a valid, content-neutral, time, place, and manner regulation and further challenging the ordinance (by alleging that Citrus County should be estopped from enforcing the zoning ordinance against Respondent Redner, because of the factual scenario of the instant case) was initiated. Both actions were consolidated for trial.

The District Court, in Case Numbers 88-50-Civ-Oc-12 and 88-193-Civ-Oc-12, William K. Thomas, J., sitting by designation, dismissed claims against the Commissioners and the Sheriff, abstained from deciding the constitutionality of the licensing ordinances, and upheld the validity of Ordinance 88-A51.

Redner, et al. appealed to the United States Court of Appeals, Eleventh Circuit, in Case No. 89-3823. The Eleventh Circuit affirmed the decision of the district court to abstain on Ordinance 88-05, to dismiss the individual Commissioners and Sheriff due to their immunity, and to

deny equitable estoppel against Citrus County's enforcement of Ordinance 88-A51. The decision of the District Court to abstain on Ordinance 88-06 was reversed and remanded for further proceedings. This reported decision is reprinted in Appendix "A" of the *Petition*.

Counsel for both Respondents and the County filed respective motions for rehearing and suggestions for rehearing *en banc*. Rehearing and rehearing *en banc* was denied on May 20, 1991.

In the state criminal cases, Redner was convicted on October 6, 1988 and was sentenced on October 17, 1988. Redner appealed the county court convictions to the circuit court for the Fifth Judicial Circuit of Florida, Case No. 88-499-CF. The state circuit court, in its appellate capacity, affirmed the convictions of the trial court and issued its mandate on August 13, 1990. Redner subsequently filed a petition for writ of certiorari with the appropriate Florida Fifth District Court of Appeal. The petition was denied on August 31, 1990. Redner then filed a motion for rehearing of said denial, which was itself denied on September 28, 1990, thereby exhausting Redner's state court remedies of the convictions and sentences at issue herein. All state court criminal action pertained only to Ordinance 88-05.

Despite the fact that, at each phase of the state court proceedings it was clearly shown that Ordinance 88-05 plainly lacked the adequate procedural safeguards mandated by this Court in the case of FW/PBS v. City of Dallas, 493 U.S. 215 (1990), no relief was given nor was any written opinion issued in any state court forum.

While the federal action progressed, no order to report from the trial court was received by Redner or his Counsel. It was not until April 16, 1991, that an order, reflecting a date of August 22, 1990, was received by Redner and his Counsel. Compliance with the order was physically impossible since it commanded Redner to report within ten (10) days of it date.

A Petition for Writ of Habeas Corpus was filed in the United States District Court for the Middle District of Florida, Case No. 91-90-Civ-Oc-14 on April 22, 1991. Filed contemporaneously with the Petition for Writ of Habeas Corpus was an emergency motion for stay of state court sentence.

On April 29, 1991, a stay of the state court sentence pending the administration of the Federal Petition for Habeas Corpus was sought in the state court. The state court declared that it had no jurisdiction to entertain such a stay and the motion was withdrawn. Respondent Redner surrendered himself to the Citrus County Sheriff instanter. Redner was immediately incarcerated and served out the remaining forty-seven (47) days of the sixty (60) day sentence imposed on him by the state trial court. The previous thirteen (13) days were served pending a determination in the state court as to whether to release Redner on supersedeas bond during the administration of his state court appellate proceedings. Redner was released on June 4, 1991 and completed the six (6) months probation imposed by the state court sentence.

The emergency motion in the district court for stay of

state court sentence was denied while Redner was incarcerated. The Petition for Writ of Habeas Corpus was still pending at the time this brief in opposition was filed.

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WHY THE WRIT SHOULD BE DENIED

I. THE FULL FAITH AND CREDIT ACT, 28 U.S.C. § 1738, IS MISAPPLIED BY PETITIONER AND DID NOT REQUIRE THE COURT OF APPEALS TO AFFIRM THE LOWER COURT'S INVOCATION OF ABSTENTION.

A. The District Court's Abstention From The Merits of Respondents' Challenges To 88-05 and 88-06 Was Improper.

The Petitioner suggests that the Court of Appeals correctly affirmed the District Court's abstention from deciding the Respondents' claims concerning the constitutionality of 88-05, as necessarily and inevitably interfering with the ongoing state court criminal proceedings against Respondents.

In Younger v. Harris, this Court held that abstention is appropriate where federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings; the Court recognized exceptions for bad faith, harassment, or a patently invalid state statute. 401 U.S. 37, 91 S.Ct. 746,

27 L.Ed.2d 669 (1971). The Court has further extended Younger to cases in which federal jurisdiction was invoked for the purposes of obtaining declaratory relief when the federal plaintiff is a defendant in a pending state criminal prosecution, if Younger would have barred an injunction in the circumstances. Samuels v. Mackell, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971).[2]

The Court of Appeals, applying Younger and its progeny to the facts of this case, concluded that the district court properly abstained from deciding the constitutionality of Ordinance 88-05. The court recognized that, as long as a federal challenge to a state statute or local ordinance "relate[s] to pending state proceedings, proper respect for the ability of state courts to resolve federal questions presented in state court litigation mandates that the federal court stay its hand." Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 14, 107 S.Ct. 1519, 1527, 95 L.Ed.2d 1 (1987).

The Court of Appeals recognized that the state criminal proceedings were well under way by the time, "any proceedings of substance on the merits [had] taken place in federal court." (citing Hicks, 422 U.S. at 349, 95 S.Ct. at 2292). This threshold Younger consideration was deemed an appropriate basis to invoke the doctrine of abstention.

In addressing the alleged bad faith of Citrus County, (as

[2]Younger was further extended when the Supreme Court held that federal courts may not provide declaratory relief if a state prosecution is commenced against the federal plaintiffs "after the federal complaint is filed but before any proceedings of substance on the merits have taken place in the federal court ..." Hicks v. Miranda, 422 U.S. 332, 349, 95 S.Ct. 2281, 2292, 45 L.Ed.2d 2223 (1975); see also Doran v. Salem Inn, Inc., 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975).

suggested by the sequence of events) as a possible exception to the Younger doctrine, the court focused only on a consideration of the presence of state prosecutions undertaken in bad faith.[3]

The Court of Appeals stated that Redner presented no evidence that the prosecution was brought without a reasonable likelihood of obtaining a valid conviction and (in Footnote 8 of the reported opinion) suggested that the only bad faith that Redner asserted was the County's enactment of an ordinance directed solely at him one day before he planned to open his adult entertainment facility.[4]

The Court of Appeals further stated that, "Nothing about that act by the County seems to establish, in itself, bad faith". (Footnote 8 of the Opinion, 919 F.2d at 650).

There is precedent to the contrary which supports the bad faith argument. In providing this authority to the various courts which have administered the many legal actions which grew from the instant facts, the First Amendment status of the anticipated business has been

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[3]Bad faith was defined as "a prosecution (which) has been brought without a reasonable expectation of obtaining a valid conviction". Kugler v. Helfant, 421 U.S. 117, 126 n.6, 95 S. Ct. 1524, 1531 n.6, 44 L. Ed. 2d 15 (1975).

[4] At the emergency hearing conducted for the enactment of Ordinance 88-05, the acting commissioners made comments like, "[help] this board to close that place down" and "get out, get after the man that owns the property who has leased it to [Respondent] ... see if maybe you could get him to change his mind and do whatever he has to do ... see if you can convince him that he's made a mistake." and "I think you know what I mean, but we need to, again, restrict our comments to the thing in front of us to make sure because this thing may end up in court. We want to make sure that we don't mess it up by what we say in public ..." (Commissioners Broska and Bryant).

continually stressed.[5]

In the instant case, the factual scenario and sequence of events indicate clearly the existence of bad faith and the imposition of an unconstitutional prior restraint sufficient to qualify as an exception to the Younger abstention doctrine.

In Avalon Cinema Corporation v. Thompson, 677 F.2d 659 (8th Cir. 1981) {modified as to Attorneys Fees, 689 F.2d 187 (8th Cir. 1982)}, the factual scenario was almost identical to the situation herein. In Avalon, building permits to construct a movie theatre and bookstore at a single location in North Little Rock, Arkansas were obtained on September 30, 1980. At that point in time, the location was properly zoned as a commercial area. Also on that date, the proper occupational license (or privilege license) to operate a movie theatre was obtained. Avalon planned to exhibit at the theatre sexually-oriented films to consenting adults over eighteen (18) years of age. There were no adult movie theatres in the City at the time, and none, other than Avalon, was preparing to open. Money was spent remodelling and preparing the theatre for its commercial opening.

The City had a separate privilege license for "adult" bookstores in addition to the license for bookstores generally. It did not have a separate license for "adult"

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[5]As this Court has consistently recognized, the instant case involves the attempted presentation of entertainment held to be expression which is entitled to limited protection under the First Amendment. California v. LaRue, 409 U.S. 109, 93 S. Ct. 390, 34 L. Ed. 2d 3342 (1972); Schad v. Mt. Ephraim, 452 U.S. 61, 101 S. Ct. 2176, 68 L. Ed. 2d 671 (1981); Barnes v. Glen Theater, 59 U.S.L.W. 4745, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991). This is critical in any consideration of bad faith.

movie theatres.

On November 19, 1980, Avalon secured the privilege license to operate an adult bookstore at the selected site. That same day, the North Little Rock City Council convened a special meeting for the purpose of enacting an emergency zoning ordinance that prohibited, within one hundred yards of specified structures and areas in the City, the exhibition or sale of any sexually-oriented film. The Avalon Theatre was located within one hundred yards of a residential area. The emergency ordinance effectively precluded Avalon from legally commencing business.

The Avalon court, in concluding that the ordinance could not be squared with the relevant precedents under the First Amendment, found that the action of the City failed to meet the four part test in United States v. O'Brien, 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968), and called into question not only the applicability of the evidentiary basis used to support the ordinance, but the timing of the enactment of the ordinance as well.

The application to the instant case is clear. In both situations, municipal legislation is arguably being utilized to preclude specific parties from the presentation of First Amendment protected expressive entertainment. This Court has recognized no import in this distinction, clearly indicating that when either zoning or licensing ordinances are utilized impermissibly to restrain First Amendment

protected activities, they are equally as invalid.[6]

In 754 Orange Ave v. City of West Haven, Conn., 761 F. 2d 105 (1985), the court affirmed a lower court injunction against the City of West Haven from enforcing its zoning and licensing ordinances against a company wishing to present sexually-oriented entertainment within a leased premises.

In 754 Orange, the factual scenario is again almost identical to the instant case. On February 24, 1984, 754 Orange applied to the City for a building permit to make renovations to a leased premises in order to open an adult bookstore and theater. The City had a zoning ordinance which placed restrictions on amusement and entertainment facilities, but its applicability to the use contemplated by 754 Orange was "unclear", save for a provision involving locational distance restrictions to schools, parks or playgrounds, which provision was clearly not applicable to 754 Orange because the nearest preclusive use was over 1,000 feet away.

The City also had a licensing and permitting ordinance that was similarly unclear in addressing the applicability to the coin operated viewing machines contemplated for the leased premises. None of these issues were addressed or resolved when 754 Orange applied to the City for a building permit, which the City refused to issue.

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[6] See FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990), in which a licensing ordinance was held unconstitutional on First Amendment issues, and 11126 Baltimore Blvd. v. Prince George's County, Maryland, 110 S.Ct. 2580 (1990) in which the same First Amendment safeguards were applied to a zoning ordinance.

The 754 Orange court addressed several First Amendment issues, but the most salient application to the instant case is the following:

> "In addition, section 32-2.7 is impermissible as enacted, because its adoption strongly suggests that it was aimed solely at 754 Orange. Only after the City learned that 754 Orange's leased premisses is beyond 1,000 feet from any school, park or playground did the City amend the ordinance so as to include 754 Orange's building within its scope. It is true that, as a matter of general zoning law in Connecticut, a permit applicant does not have a vested right in the existing classification of his land; instead his right to establish a particular use may be summarily terminated by an amendment that reclassifies his land and outlaws the use in question. (Citation omitted.)
>
> "Even as a matter of zoning law, however, a court will not allow changed building zone regulations to act as a bar to a building project where it would be inequitable to do so." (Citation omitted.) Id. at 113.

The notable similarities between the factual scenarios of Avalon and 754 Orange are clear evidence that Citrus County acted in an impermissible manner in its "emergency" enactment of Ordinance 88-05. It is axiomatic that the imposition of municipal legislation which results in a discriminatory prior restraint should be

construed as an act of bad faith.[7] On facts that are this obvious, such bad faith should clearly suffice as an exception to the Younger abstention doctrine.

The Petitioner urges that the provisions of 88-06 which are identical to 88-05 are severable and also urges that the district court's abstention from the merits of Respondents' challenges to the identical provisions in 88-06 was equally mandatory under Younger v. Harris.

For the reasons specified in support of not exercising abstention as to 88-05, the Respondents would submit that the Court of Appeals reached the correct conclusion in deciding not to abstain in considering Ordinance 88-06.[8]

The Petitioner has not made a convincing argument in asserting this basis for the issuance of the writ.

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[7]The exception noted in Younger, and based on Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116, (1965) is appropriately applied to the circumstances of the instant case.

> "'[T]he threats to enforce the statutes against appellants are not made with any expectation of securing valid convictions, but rather are part of a plan to employ arrests, seizures, and threats of prosecution under color of the statute to harass appellants and discourage them and their supporters from asserting and attempting to vindicate the constitutional rights of Negro citizens of Louisiana.' 380 U.S., 482, 85 S.Ct. at 1118-1119, Id. at 752.

[8]The Court of Appeals held, "The presence in Ordinance 88-06 of substantive provisions absent from Ordinance 88-05 potentially requires that each of Ordinance 88-06's provisions be construed in the context of these additional substantive provisions. Therefore, even if the federal district court had held Ordinance 88-06 might have been persuasive authority in the state court, but that such a federal court decree would have inevitably barred a contrary state judgment on the constitutionality of a different ordinance is doubtful. . . . For example, the federal court might have held - or may still hold - 88-06 unconstitutional on the basis of provisions in 88-06 but not in 88-05 . . . In addition, the state criminal proceedings would not necessarily determine the constitutionality of Ordinance 88-06." 919 F.2d at 650, n.9 & n.10.

B. The State Court Judgment On Respondents' Constitutional Challenges To 88-05 Does Not Preclude Challenges To The Provisions Of 88-06.

The Petitioner urges that the Full Faith and Credit Act, 28 U.S.C. § 1738[9], which obliges a federal court to give the same preclusive effect to a state court judgment, as it would be given under the law of the state in which the judgment was rendered[10], precludes the Respondent from relitigating similar constitutional challenges to Ordinance 88-06 which have been decided in the state courts in reference to Ordinance 88-05. This contention is without merit.

In the instant case, Ordinances 88-05 and 88-06 were challenged on several constitutional grounds and particularly on the basis of clear facial inadequacies. The facial absence of any of the adequate procedural safeguards, as mandated by the recent decision of this Court in FW/PBS, Inc. v. City of Dallas, 110 S.Ct. 596 (1990), gives clear evidence of these inadequacies.

The licensing scheme imposed by Ordinances 88-05 and 88-06 was alleged by Respondents to be an unconstitutional prior restraint. Any system of prior restraints on expression comes before the court bearing a heavy presumption against its constitutional validity. Sendak v.

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[9]By the Full Faith and Credit Act, Congress implemented the Full Faith and Credit Clause of the Constitution, art. IV, § 1, extending to the federal courts the same requirement obligatory to state courts. Migra v. Warren City School Dist., 465 U.S. 75, 80, 104 S.Ct. 892, 896, 70 L.Ed.2d 56 (1984); Kremer v. Chemical Construction Corp., 456 U.S. at 483 n.24, 102 S.Ct. at 1898 n.24.

[10]Parsons Steel, Inc. v. First Alabama Bank, 474 U.S. at 525, 106 S.Ct. at 772; McDonald v. City of West Branch, Mich., 466 U.S. 284, 287, 104 S.Ct. 1799, 1801, 80 L.Ed.2d 302 (1984); Migra v. Warren City School Dist., 465 U.S. at 81, 104 S.Ct. at 896; Kremer v. Chemical Construction Corp., 456 U.S. at 466, 102 S.Ct. at 1889.

Nihiser, 97 S.Ct. 2914, 431 U.S. 961, 53 L.Ed.2d 1057 (1977); affirming lower court cited at 405 F.Supp. 482 (ND Ind 1974).

Federal courts are charged with the primary duty of vindicating federal rights. The Younger doctrine (discussed in the previous Section), in either its criminal or civil applications, allows intervention where the challenged statute is flagrantly and patently violative of express constitutional provisions. Huffman v. Pursue, 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482; rehearing denied 421 U.S. 971, 95 S.Ct. 1969, 44 L.Ed.2d 463 (1975).

In assessing the "Full Faith and Credit" or the impact of any "interference" from a ruling by the district court or the Court of Appeals on similar constitutional challenges to an ordinance which is not the basis for the state court criminal action, is the result of Petitioners' own choice to enact the later ordinance.

Whether the concept of collateral estoppel under Florida law[11] or the federal application of issue preclusion[12] arise as considerations, they do so as the indirect result of addressing challenges to an ordinance which is not itself the basis of state court criminal action.

The Petitioner asserts that the preclusive effect of a federal court ruling, on identical issues presented in earlier ongoing state criminal proceedings is exactly the interference barred by the Younger doctrine as well as the

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[11] Mobil Oil Corp. v. Shevin, 354 So.2d 372, 374 (Fla. 1977); Seaboard Coast Line RR. Co. v. Cox, 338 So.2d 190, 191 (Fla. 1976); R & S Partnership v. Martin Schaffel Enterprises, Inc., 529 So.2d 794, 795 (Fla. 3d D.C.A. 1988); Freehling v. MGIC Financial Corp., 437 So.2d 191, 193 (Fla. 4th D.C.A. 1983).

[12] S.E.L. Maduro (Fla.), Inc. v. M/V Antonio de Gastaneta, 833 F.2d 1477, 1483 (11th Cir. 1987); I.A. Durbin, Inc. v. Jefferson Nat'l. Bank, 793 F.2d 1541, 1449-51 (11th Cir. 1986); Provau v. State Farm Mutual Automobile Ins. Co., 772 F.2d 817, 821-22 (11th Cir. 1985); Cotton States Mutual Ins. Co. v. Anderson, 749 F.2d 663, 665-67 (11th Cir. 1984).

subject of the application of the full faith and credit clause. In support of this, the cases cited by Petitioner as persuasive authority [Ballard v. Wilson, 856 F.2d 1568 (5th Cir. 1988); United Books, Inc. v. Conte, 739 F.2d 30 (1st Cir. 1984)] involved factual situations where the federal and state actions both involved the same legislation.

It must also be stressed that, in the instant case, the federal action is predicated on 42 U.S.C. § 1983[13]. Any analysis must be undertaken with a consideration of the underlying purposes of Section 1983 against the purposes of the Full Faith and Credit Act. This distinction becomes critical when the fact that the preclusive effect of 28 U.S.C. § 1738 may not be given in federal court to a constitutionally infirm judgment. Kremer v. Chemical Construction Corp., 456 U.S. 461, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982).[14]

The Respondents provided clear evidence in every state court forum that Ordinance 88-05 was constitutionally infirm.[15] Substantial authority questioning the lack of

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[13]42 U.S.C. section 1983 was drafted to provide a federal forum for litigants who Congress feared might not receive substantial justice from a state court. The implementing statute for the full faith and credit clause, 28 U.S.C. section 1738, provides that a state's preclusion rules should control matters originally litigated in that state. When a state court has decided, or could have decided, issues related to a subsequent 1983 action, the underlying purposes of sections 1983 and 1738 are in direct conflict. Full Faith and Credit and Section 1983: A Reappraisal, 63 N.C.L.Rev. 59 (1985).

[14]See also the discussion of Kremer in Parker v. Danville Metal Stamping Company, Inc., 603 F.Supp. 182 at 188 (C.D. Il. 1985).

[15]The facial invalidity of Ordinance 88-05 was stressed in every forum. The Respondents were effectively and entirely precluded from the presentation of First Amendment protected expressive entertainment through the reactionary enactment of "emergency" Ordinance 88-05. The combination of this, with the irreparable harm caused by the Respondents' loss of their First Amendment rights, indicates that none of the state courts involved in this case adequately recognized the unconstitutionality of the ordinance. The following was stressed to every state court:

procedural safeguards and the possibility of an unconstitutional prior restraint (which became a reality) was pointed out in every forum. Cited by Respondents in every state court forum was the case of FW/PBS v. The City of Dallas, supra.[16]

"The loss of First Amendment freedoms, for even a minimal period of time, unquestionably constitutes irreparable injury. See New York Times Co. v. United States, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971). Since such injury was both threatened and occurring at the time of Respondents' motion and since Respondents sufficiently demonstrated a probability of success on the merits, the Court of Appeals might properly have held that the District Court abused its discretion in denying preliminary injunctive relief. See Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 67, 83 S.Ct. 631, 637, 9 L.Ed.2d 584 (1963)." Elrod v. Burns, 427 U.S. 347, 96 S.Ct. 2673 (1976).

[16]In FW/PBS, this Court reviewed a comprehensive ordinance adopted by the City of Dallas, which regulated sexually oriented businesses.

There are several critical similarities between the Dallas ordinance and Citrus County Ordinance 88-05.

The Dallas ordinance was struck down as being violative of the First Amendment, on the grounds that it constituted a prior restraint upon protected expression, and that it failed to provide adequate procedural safeguards as required by Freedman v. Maryland, 380 U.S. 51 (1965).

This Court used the analogy that, like a censorship system, a licensing scheme creates the possibility that constitutionally protected speech will be suppressed where there are inadequate procedural safeguards to ensure prompt issuance of a license. This Court held that a license for a First Amendment protected business must be issued in a reasonable period of time and, therefore, the first two Freedman safeguards are essential.

In the Dallas ordinance, there was a requirement that the Chief of Police approve the issuance of a license within 30 days after the receipt of an application, and also conditioned such issuance upon approval by other municipal inspection agencies without setting forth time limits within which those inspections must occur. Since the ordinance failed to set forth an effective time limitation on the licensing decision, and since it also failed to provide an avenue for prompt judicial review so as to minimize suppression of speech in the event of a license denial, its licensing requirement was unconstitutional.

Citrus County Ordinance 88-05, in § 2-5 (a)(1), "Time Period for Granting or Denying License", places a forty-five (45) day limit after proper filing to process an application with the County Administrator. Subsection (c) of the section provides, just like the Dallas ordinance, that denial can be conditioned on any disapproval of other local government inspection agencies, namely (as set forth in § 2-4(a)), the Department of Development Services, Fire Protection, and the Health Department.

Under Florida law, forty-five (45) days is adequate time to pass a zoning

In recognizing the fact that a licensing scheme creates the possibility that constitutionally protected speech will be suppressed where there are inadequate procedural safeguards to insure the prompt issuance of a license, this Court found that the absence of these procedural safeguards would result in legislation which was facially unconstitutional.[17] Id.

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ordinance, which in actuality Citrus County did, resulting in zoning non-compliance for the anticipated premises of Respondent's business.

Section 2-4(a) of Ordinance 88-05 states only that:

> "... Each department shall promptly conduct an inspection of the applicant, application and the proposed establishment in accordance with its responsibilities ..." Ordinance 88-05, § 2-4(a).

Clearly, just like the Dallas ordinance, Citrus County places no specific time limitation on the County's inspection agencies other than the vague suggestion that they be "prompt". In addition to this infirmity, allowing an applicant to begin operation pursuant to § 2-5(a)(1) after the expiration of the forty-five (45) day period, "unless and until the County Administrator notifies the applicant of a denial of the application and states the reasons for the denial" results in inadequate procedural safeguards under this Court's prior decisions.

The forty-five (45) day approval period leaves an applicant vulnerable not only to penal sanctions for any County code or regulatory violations which may occur during the interim between submission and approval or denial, but is also compounded by other infirmities in the ordinances.

[17]Section 2-11 provides for the suspension of a license for a variety of alleged local government regulatory violations. This section states that:

> "The Department shall promptly notify the licensee of the violation and shall allow the licensee a seven (7) day period in which to correct the violation. If the licensee fails to correct the violation before the expiration of the seven day period the Department shall notify the County Administrator, who shall forthwith suspend the license, and shall notify the licensee of the suspension. The suspension shall remain in effect until the Department notifies the County Administrator in writing that the violation of the provision in question has been corrected."

Clearly, by not limiting the time in which the Department must notify "in writing" the County Administrator, this infirmity would also invalidate the ordinance under the FW/PBS Inc. decision. Not only do these subtle "loopholes" allow unbridled administrative discretion, the entirety of § 3 of the ordinance, which imposes an

Another critical flaw brought to the attention of the state courts involved the second required procedural safeguard set forth in Freedman, supra: expeditious judicial review. As stressed in the FW/PBS, Inc. case, the existence of this prompt judicial review is absolutely essential. FW/PBS, Inc. cites not only Freedman, supra, but also Shuttlesworth v. City of Birmingham, 394 U.S. 147, 89 S.Ct. 935 (1971) (at 155) for the proposition that a content-neutral time, place and manner regulation must provide for "expeditious judicial review".[18]

In Blount v. Rizzi, 400 U.S. 410 (1971), this Court held that administrative hearings similar to those set out in the Citrus County ordinances came nowhere near the standards required for "judicial review". The Court found that an administrative censorship scheme created by the

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additional permitting provision on any potential employee, emphasizes even more the extent to which the ordinance in question is unconstitutional.

[18]See also, National Socialist Party v. Skokie, 432 U.S. 43 (1977).
Section 6, titled "Miscellaneous Provisions" provides in § 6-1 - Appeals:

"(1) Within fifteen (15) days of the mailing of a notice of denial of an application for a license or permit or a notice of suspension or revocation of a license or permit, the aggrieved party may file a notice of appeal with the Board.

"(2) The notice of appeal shall be filed with the Clerk of the Board. The notice of appeal shall be accompanied by payment of a filing fee of fifty dollars ($50.00) to cover administrative costs. Upon receipt of the notice of appeal and upon payment of the accompanying fifty dollars ($50.00) filing fee, the Clerk shall schedule a hearing for as soon as the Board's calendar will allow. The Clerk shall provide the appellant with at least ten (10) days notice of the time and place for the hearing." Ordinance 88-05, § 6-1; 6-2.

Not only does this section crumble from the weight of Constitutional scrutiny when the vague period of time "as soon as the Board's calendar will allow ..." is tested against the previous points and authorities contained herein, but it also fails the second part of the Freedman test. The review afforded in § 6 is insufficient.

Postal Reorganization Act and allowing the Postmaster General, following administrative hearings, to effectively decide which materials be afforded First Amendment protections, was totally unacceptable.

As a fundamental right, freedom of speech demands due process to be regulated, and the amount of process "due" was held to be of the strictest judicial requirement. The Court held that because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression,only a procedure requiring a judicial determination suffices to impose a valid final restraint. Id. at 424.

The Citrus County ordinances at issue herein are clearly unconstitutional. The failure to include adequate procedural safeguards on the face of these ordinances make them invalid. The preclusive effect of the full faith and credit clause may not be given in Federal court to a constitutionally infirm judgment.[19] The Petitioner's arguments are neither meritorious nor compelling, and this Court should decline to exercise its discretion in this matter.

II. THE COURT OF APPEALS PROPERLY REJECTED THE PETITIONER'S ARGUMENT THAT THE *ROOKER-FELDMAN* DOCTRINE REQUIRES ABSTENTION OF RESPONDENTS' CONSTITUTIONAL CHALLENGES TO THE PROVISIONS OF 88-06.

The Rooker-Feldman doctrine, which stems from the

[19]If there is reason to doubt the quality, extensiveness or fairness of procedures followed in prior litigation in state court, redetermination of issues in federal court is warranted. Morgan v. City of Rawlins, 792 F.2d 975 (10th Cir. 1986).

two Supreme Court decisions Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed 362 (1923) and District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983), is misapplied in the instant case. The *Rooker-Feldman* doctrine interprets 28 U.S.C. § 1257 as ordinarily barring direct review in the lower federal courts of a decision reached by the highest state court, for such authority is vested solely in this Court.[20]

It is also clear that a consideration of 28 U.S.C. § 1257 triggers consideration of full faith and credit.[21] (See discussion in previous section). The Petitioner urges that the court of appeals failed to adhere to the principles of the *Rooker-Feldman* doctrine by considering provisions of 88-06. As the court of appeals properly recognized, there are several substantive differences between 88-05 and 88-06.[22]

Because these considerations involve entirely different ordinances, and also because no decision was ever reached or presented to the Florida Supreme Court, the *Rooker-Feldman* doctrine has no application in the instant case. Respondents would also urge that cogent considerations of the facial unconstitutionality of the ordinance (not only as

[20]ASARCO, Inc. v. Kadish, 490 U.S. 605, 622, 109 S.Ct. 2037, 2048, 104 L.Ed.2d 696 (1989).

[21]Allen v. Allegheny Co., 196 U.S. 458, 25 S.Ct. 311, 49 L.Ed. 551 (1905); Johnson v. New York Life Ins. Co., 187 U.S. 491, 23 S.Ct. 194, 47 L.Ed. 273 (1903); Western Life Indem. Co. v. Rupp, 235 U.S. 261, 35 S.Ct. 37, 59 L.Ed. 220 (1914).

[22]Redner v. Citrus County, 919 F.2d at 650, n.9.

applied to the concepts of abstention and full faith and credit) would indicate that a deprivation of the federal courts to address the clear federal questions involved in this case would continue the pattern of prejudice which has been imposed on Respondents.

In light of the points and authorities presented by the Respondents and the undeniable fact that the bases asserted by Petitioner to invoke this Court's discretionary review are all interrelated. The Petitioner has failed to show adequate in this context for the granting of the writ.

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CONCLUSION

For the reasons discussed herein, this Court should decline to exercise its discretionary jurisdiction in this matter.

Respectfully submitted,

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